

COMMONWEALTH OF VIRGINIA
STATE CORPORATION COMMISSION
AT RICHMOND, DECEMBER 20, 2007

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APPLICATION OF

HIGHLAND NEW WIND DEVELOPMENT, LLC

CASE NO. PUE-2005-00101

For Approval to Construct, Own and Operate an
Electric Generation Facility in Highland County,
Virginia pursuant to §§ 56-46.1 and
56-580 D of the Code of Virginia

FINAL ORDER

On November 8, 2005, Highland New Wind Development, LLC ("Highland Wind" or "Applicant"), filed an application for approval to construct, own and operate an electric generation facility in Highland County, Virginia, pursuant to §§ 56-46.1 and 56-580 D of the Code of Virginia ("Code") ("Application"). Highland Wind proposes to construct and operate a wind energy generating facility in Highland County, Virginia, near the West Virginia border, just northeast of State Route 250 on parts of Allegheny Mountain known as Red Oak Knob and Tamarack Ridge.¹ The proposed facility would consist of up to twenty wind turbines of up to 2.00 MW nominal capacity each. The wind turbines would be mounted on free-standing tubular towers with the rotors reaching up to a height of 400 feet.² A new substation with transformers and other equipment would interconnect the proposed facility to an existing 69 kV line owned by Allegheny Power.³

On December 28, 2005, the Commission issued an Order for Notice and Hearing that, among other things, directed the Applicant to publish notice of its application, established a

¹ Application at 2.

² *Id.* at 7.

³ *Id.* at 7-8.

procedural schedule, set hearing dates to receive public comment and evidence, and appointed a Hearing Examiner to conduct all further proceedings. The following parties filed a notice of participation as a respondent: Ralph H. Swecker, Christopher T. Swecker, Pendleton Stokes Goodall, III, McChesney Goodall, III, William Stokes Goodall, Wayne Stokes Goodall, and Gregory Warnock (collectively, "Highland Citizens"); Nature Conservancy in Virginia ("Nature Conservancy"); Highland County Board of Supervisors ("Highland County"); and Michel A. King, *pro se*.

On March 1, 2007, Hearing Examiner Alexander F. Skirpan, Jr., entered a Report that explained the extensive procedural history of this case, summarized the record, analyzed the evidence and issues in this proceeding, and made certain findings and recommendations ("Hearing Examiner's March 1 Report"). As highlighted by the Hearing Examiner, 216 individuals filed written or electronic comments in opposition to the proposed project, and 93 individuals filed written or electronic comments in support of the proposed project.⁴

The Hearing Examiner explained that on March 13 and 14, 2006, local hearings to receive public testimony were held in the Highland Elementary School Gymnasium, Myers-Moon Road, Monterey, Virginia. Twenty-seven public witnesses testified on March 13, 2007, and 39 public witnesses testified on March 14, 2007.⁵ Evidentiary hearings were subsequently held in Richmond on October 3, 30, and 31, 2006 and November 1, 6, 15, and 16, 2006. Twenty-two public witnesses testified at the hearings in Richmond.⁶ The following appeared at one or more of the hearings: John W. Flora, Esquire, Brian Brake,

⁴ Hearing Examiner's March 1 Report at 2.

⁵ *Id.* at 4.

⁶ *Id.* at 5.

Esquire, Richard D. Gary, Esquire, and Charlotte McAfee, Esquire, on behalf of the Applicant; Anthony J. Gambardella, Esquire, Daniel Summerlin, Esquire, David S. Bailey, Esquire, and John C. Singleton, Esquire, on behalf of Highland Citizens; Melissa Ann Dowd, Esquire, on behalf of Highland County; Wiley F. Mitchell, Jr., Esquire, on behalf of the Nature Conservancy; Michel A. King, *pro se*; and Wayne N. Smith, Esquire, Donald H. Wells, Esquire, and William H. Chambliss, Esquire, on behalf of the Commission's Staff ("Staff"). On January 19, 2007, post-hearing briefs were filed by Highland Wind, Highland Citizens, Nature Conservancy, Michel A. King, and Staff.

The Hearing Examiner's March 1 Report included the following findings and recommendations:⁷

1. The proposed facility will have no material adverse effect upon the reliability of electric service provided by any regulated public utility;
2. The proposed facility advances the goal of electric competition in the Commonwealth;
3. The proposed facility will have a positive impact on economic development within the Commonwealth;
4. Construction and operation of the proposed facility will not be contrary to the public interest;
5. Any Certificate issued by the Commission in this case should include a sunset provision that calls for the Certificate to expire if construction has not commenced within two years from the date of issuance;
6. Any Certificate issued by the Commission in this case should require Highland Wind to comply with all permitting requirements listed in the [Department of Environmental Quality ('DEQ')] Report; and

⁷ *Id.* at 82-83.

7. Any Certificate issued by the Commission in this case should require Highland Wind to comply with [specific] conditions recommended in the DEQ Report to minimize adverse environmental impact.⁸

The following participants filed comments on the Hearing Examiner's March 1 Report on or before March 22, 2007: Highland Wind; Highland Citizens; Nature Conservancy; Michel A. King; and Staff.

On April 6, 2007, the Commission issued an Order Remanding for Further Proceedings that, among other things: (1) found that the risk to bats and birds falls within the statutory analysis required of the Commission in this proceeding; and (2) remanded this case to the Hearing Examiner for further proceedings to address the development and implementation of a comprehensive post-construction monitoring and mitigation plan for our consideration.

On October 16, 2007, Hearing Examiner Alexander F. Skirpan, Jr., entered a Report on Remand, which recommended a specific monitoring and mitigation plan based on the record of this proceeding ("Hearing Examiner's Report on Remand"). The Hearing Examiner summarized the record on remand, analyzed the evidence and issues on remand, and made certain findings and recommendations. The Hearing Examiner further explained that the Department of Game and Inland Fisheries ("DGIF") filed a notice of participation on May 24, 2007, and that evidentiary hearings on remand were held on July 17 and 18, 2007. In addition, the Hearing Examiner discussed the testimony on remand provided by the participants' witnesses and by the seven public witnesses that offered testimony during the remand hearing. The following participants filed comments on the Hearing Examiner's Report on or before November 6, 2007: Highland Wind; Highland Citizens; Nature Conservancy; Michel A. King; DGIF; and Staff.

⁸ DEQ's recommended conditions are further discussed below.

NOW THE COMMISSION, having considered the record, the pleadings, the Hearing Examiner's March 1 Report and Report on Remand, and the applicable law, is of the opinion and finds that the Application is approved subject to the requirements set forth below.⁹

Code of Virginia

Section 56-580 D of the Code states in part as follows:

The Commission shall permit the construction and operation of electrical generating facilities upon a finding that such generating facility and associated facilities (i) will have no material adverse effect upon reliability of electric service provided by any regulated public utility and (ii) are not otherwise contrary to the public interest. In review of a petition for a certificate to construct and operate a generating facility described in this subsection, the Commission shall give consideration to the effect of the facility and associated facilities on the environment and establish such conditions as may be desirable or necessary to minimize adverse environmental impact as provided in § 56-46.1.

Section 56-46.1 A of the Code states in part as follows:

Whenever the Commission is required to approve the construction of any electrical utility facility, it shall give consideration to the effect of that facility on the environment and establish such conditions as may be desirable or necessary to minimize adverse environmental impact. . . . In every proceeding under this subsection, the Commission shall receive and give consideration to all reports that relate to the proposed facility by state agencies concerned with environmental protection; and if requested by any county or municipality in which the facility is proposed to be built, to local comprehensive plans that have been adopted pursuant to Article 3 (§ 15.2-2223 et seq.) of Chapter 22 of Title 15.2. Additionally, the Commission (i) shall consider the effect of the proposed facility on economic development within the Commonwealth and (ii) shall consider any improvements in service reliability that may result from the construction of such facility.

Sections 56-46.1 A and 56-580 D also contain nearly identical language explicitly limiting the Commission's authority in this matter:

⁹ Some of the findings below were also set forth in the April 6, 2007 Order Remanding for Further Proceedings.

In order to avoid duplication of governmental activities, any valid permit or approval required for an electric generating plant and associated facilities issued or granted by a federal, state or local governmental entity charged by law with responsibility for issuing permits or approvals regulating environmental impact and mitigation of adverse environmental impact or for other specific public interest issues such as building codes, transportation plans, and public safety, whether such permit or approval is granted prior to or after the Commission's decision, shall be deemed to satisfy the requirements of this section with respect to all matters that (i) are governed by the permit or approval or (ii) are within the authority of, and were considered by, the governmental entity in issuing such permit or approval, and the Commission shall impose no additional conditions with respect to such matters. Nothing in this section shall affect the ability of the Commission to keep the record of a case open. Nothing in this section shall affect any right to appeal such permits or approvals in accordance with applicable law.¹⁰

Section 56-596 A states in part that "[i]n all relevant proceedings pursuant to [§ 56-580 D], the Commission shall take into consideration, among other things, the goals of advancement of competition and economic development in the Commonwealth."

Conditional Use Permit

The Hearing Examiner properly found that the following matters were considered by Highland County in issuing Highland Wind a conditional use permit pursuant to Highland County's zoning ordinance and comprehensive plan: property values; tourism; viewshed; height restrictions; setbacks; lighting; color of structures; fencing; security measures; erosion and sediment control; signage; access roads; and decommissioning.¹¹ As a result, the conditional use permit "shall be deemed to satisfy the requirements of [§§ 56-46.1 A and 56-580 D] with respect

¹⁰ Va. Code § 56-46.1 A.

¹¹ Hearing Examiner's March 1 Report at 68.

to all [those] matters . . . , and the Commission shall impose no additional conditions with respect to such matters."¹² Accordingly, we shall not consider those matters herein.

Economic Benefits, Reliability, and Competition

We agree with the Hearing Examiner that the proposed facility will provide economic benefits and will have no material adverse effect upon the reliability of electric service provided by any regulated public utility.¹³ We also find that the project will not have a significantly measurable impact on the advancement of competition.¹⁴ The advancement of competition, however, is not a statutory prerequisite for approval of the application, and we conclude that the project will not hinder competition in the Commonwealth.

Environmental Impact

We must consider environmental impact. The statute, however, does not require the Commission to find any particular level of environmental benefit, or an absence of environmental harm, as a precondition to approval. Rather, the statute directs that the Commission "shall give consideration to the effect of the facility and associated facilities on the environment and establish such conditions as may be desirable or necessary to minimize adverse environmental impact. . . ."¹⁵

Report from the Department of Environmental Quality

The Hearing Examiner explained that "[o]n June 30, 2006, DEQ filed its report prepared in accordance with the Memorandum of Agreement [with the Commission] Regarding Coordination of Reviews of the Environmental Impacts of Proposed Electric Generating Plants

¹² Va. Code §§ 56-46.1 A and 56-580 D.

¹³ Hearing Examiner's March 1 Report at 69-70.

¹⁴ *Id.* at 69.

¹⁵ Va. Code § 56-580 D.

dated August 14, 2002, in which DEQ coordinated a review of the proposed wind project by a number of state, federal, and local agencies."¹⁶ The state and local agencies participating in DEQ's analysis included: DEQ, DGIF, Department of Conservation and Recreation ("DCR"), Department of Historic Resources ("DHR"), Department of Agriculture and Consumer Services, Department of Health, Department of Aviation, Department of Forestry, Department of Transportation, Marine Resources Commission, Department of Mines, Minerals and Energy, Central Shenandoah Planning District Commission, and Highland County.¹⁷ The DEQ's report listed permits or approvals that may be required by the project and recommended specific conditions for any certificate of public convenience and necessity issued by the Commission in this case.

We adopt the Hearing Examiner's recommendation that, as a requirement of our approval herein, Highland Wind shall comply with the following conditions recommended in the DEQ's report:

1. Submit Final Site Plan to Reviewing Agencies – Provide a detailed site plan with project location maps showing the location of towers and all other components of the project including but not limited to the location of the three stream crossings, location of wetlands along the three stream channels, and location where the drilling beneath the stream channels will occur;
2. Conduct Archaeological and Architectural Surveys if Necessary – Coordinate with DHR for guidance regarding the potential need for archaeological and architectural surveys, recommended studies and field surveys to evaluate the project's impacts to historic resources;

¹⁶ Hearing Examiner's March 1 Report at 35 (citing Exh. 29).

¹⁷ *Id.*

3. Avoid Direct and Indirect Impacts to Wetlands – Wetland and stream impacts should be avoided and minimized to the maximum extent practicable;
4. Protect Natural Resources During Construction – Protect water quality, habitat, and aquatic resources from construction impacts by adopting recommendations from the DEQ, DGIF, and DCR;
5. Protect Species – Work closely with DGIF and the United States Department of Interior, Fish and Wildlife Service ("U.S. Fish and Wildlife Service") to ensure that threatened and endangered species are adequately protected; and
6. Coordinate Transportation Safety Issues – Coordinate closely with the Virginia Department of Transportation to evaluate and ensure that transportation issues are adequately addressed.

We reject Highland Wind's request for limitations and/or modifications to the requirements in the DEQ report.¹⁸ Rather, we find that requiring Highland Wind to comply with the above conditions recommended by DEQ is desirable or necessary to minimize adverse environmental impact.

In addition, the Hearing Examiner recommends that Highland Wind comply with the permitting and approval requirements discussed in the DEQ's report, including matters related to the following: (1) water quality and wetlands; (2) air quality permits; (3) erosion and sediment control, and stormwater management; (4) solid and hazardous waste management; (5) protected species laws; and (6) local permits and requirements.¹⁹ We reject the Applicant's request to specifically limit this requirement to obtaining three permits related to water protection, open burning, and stormwater management.²⁰ Rather, as a requirement of our approval herein,

¹⁸ Highland Wind's November 6, 2007 Comments at D-5 and D-6.

¹⁹ The Hearing Examiner also explained that Highland Wind agreed to obtain all of the required permits. Hearing Examiner's March 1 Report at 76.

²⁰ Highland Wind's November 6, 2007 Comments at D-3.

Highland Wind shall acquire all environmental and other approvals and permits necessary to construct and to operate the proposed wind energy facility and shall provide a complete list of said approvals and permits to the Director of the Commission's Division of Energy Regulation prior to operation of the facility. We find that such requirement is desirable or necessary to minimize adverse environmental impact. This requirement, however, does not direct the Applicant to obtain specific permits or approvals if Highland Wind is not otherwise legally obligated to do so.

Threatened or Endangered Species

Highland Citizens "respectfully request that [Highland Wind's] application be denied, or alternatively, that [the Applicant] be required to enter into a habitat conservation plan and seek an incidental take permit before construction of the project."²¹ The Hearing Examiner observed that "[o]utside of monitoring and mitigating cost caps, the sharpest difference between the parties on remand pertained to special provisions for endangered and threatened species" and explained as follows:

Highland Citizens contended that because the project site is within the documented migration route of the endangered Indiana bat and Virginia Big-Eared bat, and based on the presence of Bald and Golden Eagles, Highland Wind should follow the advice of DGIF and U.S. Fish and Wildlife and file a Habitat Conservation Plan [acceptable to the U.S. Fish and Wildlife Service]. More importantly, Highland Citizens recommended:

[Highland Wind]'s application should be denied just as the West Virginia Public Service Commission denied a similar project that is approximately 10 miles from [Highland Wind]'s proposed site based, in part, on the projects' potential impact to the same endangered bat species and the applicant's

²¹ Highland Citizen's November 6, 2007 Comments at 7.

failure to enter into [a Habitat Conservation Plan]
and seek an [Incidental Take Permit].²²

The Hearing Examiner, however, did "not find that the record supports requiring Highland Wind to enter into a Habitat Conservation Plan or seek an Incidental Take Permit."²³ We agree.

We find that neither the risk to threatened or endangered species, nor Highland Wind's failure to enter into a Habitat Conservation Plan and to seek an Incidental Take Permit, make this project contrary to the public interest or otherwise necessitate denial of the Application. We do not find that it is desirable or necessary to minimize adverse environmental impact to require the Applicant to enter into a Habit Conservation Plan and to seek an Incidental Take Permit. As discussed below, we require a monitoring and mitigation plan, which will provide significant information on the impacts to protected species. In addition, Highland Wind has committed to comply with (as we have further required above) all state and federal laws regarding endangered species.²⁴ Indeed, as found by the Hearing Examiner, "[n]o party has suggested that Highland Wind is required by law to enter into a Habitat Conservation Plan and seek an Incidental Take Permit."²⁵

The Hearing Examiner also noted that, "as DGIF pointed out, without a Habitat Conservation Plan and an Incidental Take Permit, Highland Wind risks costly shutdowns and penalties."²⁶ The Hearing Examiner further concluded that "Highland Wind's failure to enter into a Habitat Conservation Plan and seek an Incidental Take Permit is likely to make it more

²² Hearing Examiner's Report on Remand at 28-29 (quoting Highland Citizen's Post-Hearing Brief) (citations omitted).

²³ *Id.* at 30.

²⁴ *Id.* at 29.

²⁵ *Id.*

²⁶ *Id.*

difficult to finance the project."²⁷ Highland Wind apparently has chosen to accept the business risks attendant to not entering into a Habitat Conservation Plan and not seeking an Incidental Take Permit. This is a business risk voluntarily assumed by Highland Wind, which may impact the viability of the project. We do not find, however, that the statutory criteria applicable to this proceeding requires us to order Highland Wind *not* to undertake the financial and operating risks associated with eschewing a Habitat Conservation Plan and an Incidental Take Permit.

Finally, Highland Citizens assert that the Commission "cannot authorize the take of endangered species nor can it waive the provisions of the [federal Endangered Species Act]." ²⁸ We agree. Obviously, this Commission has no authority to sanction the take of endangered species or to waive provisions of the Endangered Species Act.

Department of Game and Inland Fisheries

As noted above, DGIF participated on remand as a formal party to this proceeding. On remand, DGIF filed the testimony of Rick Reynolds, Region 3 wildlife diversity biologist, and statewide non-game mammals project coordinator for DGIF. Mr. Reynolds testified that to minimize adverse environmental impact and to ensure the project is not otherwise contrary to the general public interest, a monitoring and mitigation plan for bats and birds for the life of the project is appropriate.²⁹ Mr. Reynolds maintained "a monitoring program is the only means to: (1) determine the effects of the facility on the state's wildlife resources; (2) assure compliance with wildlife protection laws, including Threatened and Endangered species regulations; and

²⁷ *Id.* at 30.

²⁸ Highland Citizens' November 6, 2007 Comments at 7.

²⁹ Exh. 70 at 2.

(3) develop mitigatory measures, and refine those measures as appropriate."³⁰ Mr. Reynolds proposed a specific, detailed monitoring and mitigation plan on behalf of DGIF.³¹

Monitoring and Mitigation Plan

We find that the risk to bats and birds falls within the required statutory analysis of environmental impact and the public interest. In this regard, we find that requiring Highland Wind to comply with the monitoring and mitigation plan set forth in Attachment A to this Order is desirable or necessary to minimize adverse environmental impact. We also note that such plan is primarily based upon plans proposed by DGIF and by the Hearing Examiner in this proceeding related to environmental considerations, with modifications as set forth herein.

Highland Wind "respectfully requests that the Commission balance the wildlife concerns to birds and bats with all the positive attributes derived from a wind farm to clean air, water, and human beings to determine what is desirable or necessary to minimize adverse environmental impact."³² We have considered the positive environmental attributes asserted by the Applicant. Such attributes, however, even if verifiable, do not alter the significant risk to bats and birds that will result from this project. We conclude that such attributes, even if taken in the light most favorable to the Applicant, neither legally nor factually warrant the "downsized"³³ monitoring and mitigation plan proposed by Highland Wind.

Highland Wind asserts that the "Virginia Energy Plan mandates that the Commission, 'in taking discretionary action with regard to energy issues, shall recognize the elements of the Commonwealth Energy Policy and where appropriate, shall act in a manner consistent

³⁰ *Id.*

³¹ *Id.* at Attachment A.

³² Highland Wind's November 6, 2007 Comments at 8.

³³ *Id.* at 10.

therewith."³⁴ The Applicant further states that the "Virginia Energy Plan promotes and encourages the removal of impediments to renewable energy projects," and that "Virginia's stated policy strongly favors construction of this Project."³⁵ Highland Wind concludes that the "appropriate legal conclusion, contrary to the Hearing Examiner's recommendation, is that Virginia should not impose the most stringent monitoring and mitigation standards in the country on this Project in order to chart new territory in a regional if not national concern about future cumulative bat fatalities," and that if the Commission adopts the Hearing Examiner's recommendation "[e]very potential investor in the wind market will lose interest in the Project. . . ."³⁶

We have considered the policy set forth in the Virginia Energy Plan. That policy, however, does not eliminate our obligation under § 56-46.1 A of the Code to "give consideration to the effect of that facility on the environment and establish such conditions as may be desirable or necessary to minimize adverse environmental impact."³⁷ Indeed, we have done just that, and, furthermore, we have followed the additional mandate in that same statute to "receive and give consideration to all reports that relate to the proposed facility by state agencies concerned with environmental protection." As evidenced by the monitoring and mitigation plan required herein,

³⁴ *Id.* at 4 (citing Va. Code § 67-102(c)).

³⁵ *Id.* at 5 (citing Va. Code § 67-101) (footnote omitted).

³⁶ *Id.* at 5 (emphasis removed).

³⁷ The Hearing Examiner further notes that, as pointed out by the Nature Conservancy, § 67-102 D of the Code also states as follows:

The Commonwealth Energy Policy is intended to provide guidance to the agencies and political subdivisions of the Commonwealth in taking discretionary action with regard to energy issues, and shall not be construed to amend, repeal, or override any contrary provision of applicable law. . . .

Hearing Examiner's Report on Remand at 22.

we have given consideration to the plan proposed by DGIF, which has the environmental expertise this Commission does not.

The Applicant further asserts that we must consider the impact of any monitoring and mitigation plan on the financial viability of the project: "If the Project is not built due to undue expenses imposed to address specific environmental concerns which prevent financing, then the significant positive environmental benefits arising from the Project are lost and Virginia's stated energy policy is defeated."³⁸ Highland Wind "remains concerned that the monitoring and mitigation plan as recommended by the Hearing Examiner . . . will likely prevent the Project from becoming a reality for Virginia."³⁹ Highland Wind further states that it "did not expect a monitoring and mitigation plan to be the most expensive and intrusive plan in the mid-Atlantic region or for it to become the tipping point for the economic viability of the Project."⁴⁰

The Nature Conservancy, however, "supports the [cost] caps [the Hearing Examiner] has recommended in his report, not because they are proportional and affordable – criteria which the Conservancy considers to be irrelevant – but because they are based [on] an objective determination of the likely cost of compliance."⁴¹ Rather, the Nature Conservancy asserts that any "cap should be based on a careful, objective consideration of the actual costs the Applicant is likely to incur in complying with the conditions the Commission finds necessary, without regard to the size of the project, to the project's projected revenues, or to whether the Applicant can afford to pay the cost of compliance."⁴²

³⁸ Highland Wind's November 6, 2007 Comments at 4.

³⁹ *Id.* at 1.

⁴⁰ *Id.* at 7.

⁴¹ Nature Conservancy's November 2, 2007 Comments at 3-4.

⁴² *Id.* at 3.

We find, consistent with the Hearing Examiner, that "[n]othing in § 56-46.1 A or § 56-580 D can be read to limit the establishment of conditions [desirable or] necessary to minimize adverse environmental impact by the developer's ability to pay or by whether such conditions render the project financially not viable."⁴³ The Hearing Examiner also established that, under the cost caps of his proposed plan, "even if it is assumed that maximum monitoring and mitigation costs will be incurred each year, the project will meet its targeted debt service."⁴⁴

The Hearing Examiner recommends "that absolute caps for monitoring and mitigation costs should be as follows:"

Year 1 – \$150,000 for monitoring;

Year 2 – \$150,000 for monitoring and 0.85% of Year 1 revenues for mitigation; and

Remaining Life of the Project – 1.75% of the prior year's revenues for monitoring and 0.85% of the prior year's revenues for mitigation.⁴⁵

We do not adopt the Hearing Examiner's recommended structure for the cost caps. Specifically, we find that basing the caps only on revenue may result, in certain circumstances, in a level of monitoring lower than what DGIF initially recommended and we find is desirable or necessary to minimize adverse environmental impact. DGIF Witness Reynolds supported monitoring costs of: (1) \$150,000 per year for Years 1, 2, and 3; and (2) a maximum of \$100,000 per year thereafter.⁴⁶ We find that the monitoring cost cap shall be \$150,000 per year

⁴³ Hearing Examiner's Report on Remand at 21-22.

⁴⁴ *Id.* at 23. As explained below, however, we find that a different cap structure for the monitoring and mitigation plan is desirable or necessary to minimize adverse environmental impact.

⁴⁵ *Id.*

⁴⁶ Exh. 70 at 3-4.

for Years 1, 2, and 3, and thereafter shall be the higher of (1) \$100,000, or (2) 1.75% of the prior year's gross revenues.

We find that the mitigation cost cap shall be the higher of (1) \$50,000,⁴⁷ or (2) 0.85% of the prior year's gross revenues. In addition, we note that the plan does not *require* annual expenditure of funds up to the caps if, over time, actual experience shows that less funds are necessary to meet the goals of the plan and targeted fatalities rates. The mitigation cost cap could prove insufficient if the cap is routinely met, yet the bird and bat carnage continues to exceed target levels. Conversely, the cap could conceivably prove too high for the amount of actual mitigation necessary. In either scenario, if either DGIF or the Applicant believed necessary and appropriate, it could petition this Commission for modifications to the mitigation cost caps, which could include raising, lowering, or reallocating funds among mitigation and monitoring. We would regard such a petition as premature, however, if it were brought before at least three (3) years actual monitoring have taken place. In addition, we agree with the Hearing Examiner that the required "monitoring and mitigation caps do not include charges for raptors, which should be assessed separately based on actual observed fatalities."⁴⁸

DGIF clearly advised us as to the possibility that future adjustments to the plan potentially could be necessary. As stated above, DGIF Witness Reynolds maintained that "a monitoring plan is the only means to . . . develop mitigatory measures, and *refine those measures as appropriate*."⁴⁹ DGIF was not able to confirm that the mitigation cost cap would be sufficient to meet the mortality target levels in the plan. Indeed, DGIF acknowledged that the mitigation

⁴⁷ We also note that this amount is reasonably related to certain estimates provided in this proceeding. *See, e.g.,* Exh. 76-P.

⁴⁸ Hearing Examiner's Report on Remand at 23.

⁴⁹ Exh. 70 at 2 (emphasis added).

cost cap could be "underestimated," such that if the cost cap is met – and the target levels have not been reached – no more mitigation could take place, and DGIF Witness Reynolds also stated, "I would certainly favor whatever is needed to meet the trigger levels that we've proposed."⁵⁰ Further, in DGIF's comments on the Hearing Examiner's Report, its support was not unconditional; on the contrary, DGIF expressly stated that its support for the Report's recommendations was subject to an exception for several "specific items requiring correction," among which included the life and funding of the monitoring program.⁵¹ We have attempted to correct in this Order the exceptional items consistent with DGIF's recommendations. We believe that to dismiss DGIF's stated concerns about whether the monitoring and mitigation plan as currently proposed will be effective in the future and may need refinement would fail to meet our statutory duty to give due deference to the advice we receive from the environmental agencies of state government that have far more expertise than we do in these matters.

Our Order in this case is fact specific and does not reflect any new philosophy or approach to resolving cases under these provisions of Virginia law. DGIF is an agency of the Commonwealth that has entered this case as a formal party for the purpose of providing this Commission with the benefit of its expertise on the environmental matters within its area of expertise. We are simply following the statute's directive to "receive and give consideration to all reports that relate to the proposed facility by state agencies concerned with environmental protection,"⁵² based on the facts of each individual case.

⁵⁰ Reynolds, Tr. 2029-31.

⁵¹ DGIF's November 5, 2007 Comments at 1-2.

⁵² Va. Code § 56-46.1 A.

Next, the Nature Conservancy asserts that the "possibility of future disagreements concerning the components of 'revenue' will be reduced if the Commission chooses to define the term precisely by making it unequivocally clear that the term includes gross receipts from the sale of power; gross receipts from the sale of renewable energy credits, and any other revenues, other than tax credits, which can properly be classified as income to the project."⁵³ We hereby clarify that the revenue applicable to calculating monitoring and mitigation caps includes gross receipts from the sale of power, gross receipts from the sale of renewable energy credits, and any other revenues, other than tax credits, which can properly be classified as income to the project.

The Staff states that the monitoring and mitigation plan raises "the scope of delegation of Commission authority under law."⁵⁴ DGIF "stands ready to assist the Commission in implementing enforceable conditions to achieve wildlife protection,"⁵⁵ and DGIF "reiterates its willingness to assist the Commission in the implementation of the recommendations contained in the [Hearing Examiner's Report on Remand] should the Commission determine to adopt the same."⁵⁶ The Applicant, however, requests that "reasonable notice be provided to the operator each February as to the operational parameters for seasonal migration that will be required for that calendar year" and asserts that "DGIF cannot be given authority to direct daily operations of the Project; at most, this provision must only allow the structuring of a curtailment plan addressing seasonal migration to be implemented by the Applicant."⁵⁷

⁵³ Nature Conservancy's November 2, 2007 Comments at 4-5.

⁵⁴ Staff's November 6, 2007 Comments at 4.

⁵⁵ Hearing Examiner's Report on Remand at 30-31 (quoting DGIF Brief at 8-9).

⁵⁶ DGIF's November 5, 2007 Comments at 4.

⁵⁷ Highland Wind's November 6, 2007 Comments at 16.

The monitoring and mitigation plan required herein does not represent a delegation of authority to DGIF. Rather, such plan is a requirement of our approval of the Application, and that requirement relies upon actions to be taken by DGIF. Indeed, we agree with the Hearing Examiner that "it is within the Commission's authority to establish a condition of adaptive monitoring and mitigation for this proposed facility, with DGIF directing operational modifications, with the Commission retaining jurisdiction to address any disputes that may arise related to the monitoring and mitigation plan."⁵⁸ The General Assembly has made it clear in the statutes governing this case that this Commission must give consideration to the substantive expertise of the relevant state environmental agencies when fulfilling our statutory mandate to consider the effects on the environment. Not only do we recognize and acknowledge the expertise of DGIF in this matter, we find DGIF's proposals adopted herein credible and persuasive. DGIF will implement both the monitoring and mitigation portions of the required plan. DGIF will not, however, direct daily operations of the project. As suggested by the Applicant, DGIF will structure an annual curtailment plan to be implemented by the Applicant and will provide the operator, on an annual basis, parameters for curtailment that will be required for the next plan year.

Moreover, any disputes during implementation of the monitoring and mitigation plan may be resolved through the Commission's Rules of Practice and Procedure that permit, among other things, both formal and informal proceedings as selected by a complainant.⁵⁹ Thus, as requested by the Applicant, "[i]f the Applicant fails to satisfy a condition of the Certificate [of

⁵⁸ Hearing Examiner's Report on Remand at 31.

⁵⁹ See, e.g., 5 VAC 5-20-70.

Public Convenience and Necessity], recourse should be to the Commission,"⁶⁰ and, as noted by the Hearing Examiner, the "Commission retain[s] jurisdiction to address any disputes that may arise related to the monitoring and mitigation plan."⁶¹

Highland Wind also expressed concern about access to the project site. The Hearing Examiner found "that the site must be accessible, *without limit*, to state and federal agencies operating within the scope of their authority."⁶² Highland Wind asserts, however, that the "Hearing Examiner's open-ended approach toward access to the Project's site does not give adequate consideration to the nature of the Project or its site" and further states that "the operator of the Project should receive notice of any governmental visit."⁶³ Specifically, the Applicant requested 48-hour notice by email to Highland Wind and its counsel prior to any access by state or federal agencies,⁶⁴ and further noted that "reasonable business practice requires that a log be maintained as to who has accessed the site and when."⁶⁵ The Applicant also stated that "insurance providers will expect that safety procedures be implemented to prevent . . . risk of injuries."⁶⁶

We find that the site must be accessible to state and federal agencies operating within the scope of their authority. We do not find, however, that it is in the public interest to require the requested 48-hour notice prior to site access and to the monitoring activities ordered herein.

⁶⁰ Hearing Examiner's Report on Remand at 31 (quoting Highland Wind Brief at 27).

⁶¹ *Id.*

⁶² *Id.* at 32 (emphasis added).

⁶³ Highland Wind's November 6, 2007 Comments at 16.

⁶⁴ Hearing Examiner's Report on Remand at 32.

⁶⁵ Highland Wind's November 6, 2007 Comments at 17.

⁶⁶ *Id.*

Highland Wind, however, shall maintain a list of state and federal employees that have access to the site and shall maintain a log of who has accessed the site and when. Finally, Highland Wind shall implement safety procedures to protect all those on the site during site visits.

Sunset Provision

The Hearing Examiner recommended the following two-year sunset provision: "Any Certificate issued by the Commission in this case should include a sunset provision that calls for the Certificate to expire if construction has not commenced within two years from the date of issuance."⁶⁷ Highland Wind states that it "has every intention of commencing construction prior to the expiration of the tax credits at the end of 2008," but requests that the sunset provision be changed to account for, among other things, any appeal of the Commission's Final Order.⁶⁸ We reject this request. The two-year sunset provision ordered below specifies that Highland Wind may petition the Commission for an extension for good cause shown. Accordingly, if the Applicant subsequently believes that it has good cause to request an extension, due to legal proceedings or other reasons, it may properly request the same.

Public Interest

With the requirements imposed herein on our approval of the Application, and without considering the matters that were considered by Highland County in issuing the conditional use permit as discussed above, we find that the proposed "generating facility and associated facilities . . . are not otherwise contrary to the public interest."⁶⁹

⁶⁷ Hearing Examiner's March 1 Report at 82.

⁶⁸ Highland Wind's November 6, 2007 Comments at D-1.

⁶⁹ Va. Code § 56-580 D.

Motion for Stay

On March 7, 2007, Highland Citizens filed a Motion for Stay, which requested the Commission "to stay this proceeding until the Supreme Court of Virginia issues its decisions in *Lucile Swift Miller, et al. v. Highland County, et al.* (Record Number 062111) . . . and *Tom Brody, et al. v. Highland County, et al.* (Record Number 062489)" ⁷⁰ In the April 6, 2007 Order Remanding for Further Proceedings, the Commission deferred ruling on Highland Citizens' Motion for Stay based on our decision to remand this case. On September 18, 2007, Highland Wind filed a motion asking the Commission to take judicial notice that the Supreme Court of Virginia issued a decision in the two cases above on September 14, 2007; the Hearing Examiner granted the motion. ⁷¹ We find that Highland Citizens' Motion for Stay is moot and hereby denied.

Accordingly, IT IS HEREBY ORDERED THAT:

(1) Pursuant to §§ 56-46.1 and 56-580 D of the Code of Virginia, and subject to the requirements discussed above and ordered herein, Highland Wind is granted authority and a certificate of public convenience and necessity to construct and to operate the wind energy generating facility and its associated facilities in Highland County as described in this proceeding.

(2) Highland Wind shall comply with the conditions recommended in the DEQ's report as set forth above.

(3) Highland Wind shall acquire all environmental and other approvals and permits necessary to construct and to operate the proposed wind energy facility and shall provide a

⁷⁰ Motion to Stay at 1.

⁷¹ Hearing Examiner's Report on Remand at 3.

complete list of said approvals and permits to the Director of the Commission's Division of Energy Regulation prior to operation of the facility.

(4) Highland Wind shall comply with the monitoring and mitigation plan as set forth herein and as attached to this Final Order as Attachment A.

(5) Highland Wind shall provide access to the project site as set forth herein.

(6) Highland Citizens' Motion for Stay is denied.

(7) The certificate of public convenience and necessity granted herein shall expire two (2) years from the date of this Final Order if construction of the wind energy generating facility approved herein has not commenced. Highland Wind may petition the Commission for an extension of this sunset provision for good cause shown.

(8) The case is dismissed.

JAGDMANN, Commissioner, Dissents in part:

I dissent to that part of the majority Order, and to the rationale therefor, adopting the following provision in the monitoring and mitigation plan required therein:

- At any time after year three, DGIF and/or the Applicant may petition this Commission for modifications to the mitigation cost caps, which could include raising, lowering, or reallocating funds among mitigation and monitoring.

I dissent because this provision in effect establishes *no* cost cap on mitigation activities for the life of the project and, further, allows the mitigation requirements of the plan to become a perpetual moving target.

The environmental concerns addressed by the monitoring and mitigation plan have not risen to a level that necessitates a permit from a federal, state, or local governmental agency specifically charged with protecting the environment. Indeed, if such a permit were required, the

Commission would be prohibited from imposing "additional conditions with respect to such matters."⁷² As no permit is required, the Commission is to consider the environmental impacts of the facility (in this instance, impacts on birds and bats) and "establish such conditions as may be desirable or necessary to minimize adverse environmental impact."⁷³ This requires the Commission to exercise its discretion, just as we must regarding other requirements in the applicable statutes. Accordingly, the Commission is to be cognizant of environmental concerns, just as it is required to be cognizant of service reliability, effects on economic development, and the other statutory standards that we must apply.⁷⁴

Applying these statutory obligations, I find that the monitoring and mitigation cost cap established by the majority should be adopted without the majority's additional conclusion that such cap is not really a cap – but may be increased without limit based on some undefined proceeding at one or more undefined points in the future. Moreover, by keeping this matter subject to further modification pursuant to the Final Order issued today, the majority adopts a condition that invites the very core of the mitigation requirements to be re-written, over and over again, at subsequent points in the future. An applicant before this Commission, requesting a certificate of public convenience and necessity under Virginia statutes, deserves a more definitive ruling on the requirements that will be attached to such certificate.

The Hearing Examiner found that his recommended cost cap satisfies our statutory mandate above. Furthermore, DGIF – the expert agency relied upon by the majority and which the majority finds "credible and persuasive" – expressly "supports the recommendations

⁷² Va. Code §§ 56-46.1 A and 56-580 D.

⁷³ *Id.*

⁷⁴ See Va. Code §§ 56-46.1 A, 56-580 D, and 56-596 A.

contained in the [Hearing Examiner's] Report and urges the Commission to adopt the findings set forth therein."⁷⁵ The Nature Conservancy also comments that the Commission and its Hearing Examiner have "provided every reasonable opportunity for both the parties and the general public to be heard," and that it "considers the [Hearing Examiner's monitoring and mitigation] plan to be a thoughtful and reasonable response to the Commission's charge."⁷⁶

The majority, however, apparently believes that there should be no real cost cap on the monitoring and mitigation plan because "[t]he mitigation cost cap could prove insufficient if the cap is routinely met, yet the bird and bat carnage continues to exceed target levels." I do not share in this finding. We do not have to conclude, under the statute, that the monitoring and mitigation plan will, without exception or question, result in a specific number of bird and bat kills. Rather, we must find that the monitoring and mitigation plan is "desirable or necessary to minimize adverse environmental impact." Based on the evidence in this proceeding, I find – as did the Hearing Examiner and DGIF – that a specific cost cap can be established, as part of a comprehensive monitoring and mitigation plan, that adequately and reasonably addresses the risk to birds and bats and that, accordingly, is "desirable or necessary to minimize adverse environmental impact."

In addition, after the third year of operation, I find it reasonable to allow DGIF to allocate the total funds, under the cap, between monitoring and mitigation activities based on previous years' results. Contrary to the majority's suggestion, a new and separate proceeding is not needed to make this finding. There is sufficient evidence, right now, for the Commission to allow DGIF to allocate future funds under the total cap based on actual results.

⁷⁵ DGIF's November 5, 2007 Comments at 1.

⁷⁶ Nature Conservancy's November 2, 2007 Comments at 1.

Finally, the philosophical approach reflected in the majority opinion, if extended to future applications of this nature, could put an end to the construction of generating facilities in the Commonwealth, renewable or otherwise. That is, the provision to which I dissent could create untenable financial uncertainty. As repeatedly explained by Highland Wind throughout this proceeding, construction of generating facilities obviously requires investment decisions based on analyses as to the financial viability of the proposed project. By not establishing a definable cost cap for mitigation and by leaving the plan wide open for future modifications, the majority has created a situation where potential investors simply will not know the limits to which operation of the project may be curtailed, pursuant to Commission order, throughout its expected life.

With the exceptions discussed herein, I agree with the remainder of the majority order approving Highland Wind's Application subject to the specific requirements set forth therein.

AN ATTESTED COPY hereof shall be sent by the Clerk of the Commission to all persons on the official Service List in this matter. The Service List is available from the Clerk of the State Corporation Commission, c/o Document Control Center, 1300 East Main Street, First Floor, Tyler Building, Richmond, Virginia 23219.

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Monitoring and Mitigation Plan

Objectives:

- To determine actual levels of project-related wildlife mortality occurring at the Highland New Wind Development project; to examine potential correlations among project operational protocols, seasonal or diurnal wildlife passage rates and site utilization, weather-related variables, and observed wildlife mortality by species or taxa; to test and examine the effectiveness of operational adjustments or deterrent technologies at reducing wildlife mortality; and to implement appropriate operational protocols or technology to reduce wildlife mortality to acceptable levels.
- As operational protocols or deterrent technology are identified as appropriate and feasible to achieve long-term reduction of project-related wildlife mortality to acceptable levels, the appropriate protocols or deterrent technology will be implemented by the operator, and incorporated into project permits and licenses issued by the Commission and other state or federal regulatory agencies.

Research Issues and Priorities:

- Determine the numbers and species of birds and bats killed per turbine per year.
- Examine whether and how observed mortality correlates with weather conditions or diurnal cycles.
- Examine whether and how observed mortality correlates with spring and fall passage rates of birds and bats, and winter use of the site by raptors.
- Examine whether and how operational changes (*e.g.*, cut-in speed, possible deterrents, etc.) affect observed mortality rates by species or taxa.

Research Parameters:

- Daily fatality searches at a minimum of 10 randomly selected turbines from April 1 – October 30 to determine bird and bat losses for at least the first three years of operation.
- Daily fatality searches at a minimum of 10 randomly selected turbines from November 15 – March 31 to determine raptor losses for at least the first three years of operation.
- Onsite climatological data will be collected at an interval suitable to identify and analyze potential correlations with passage and/or fatality rates.
- Existing and future passage rate data from available sources (project consultants, U.S. Fish and Wildlife research, DGIF research, etc.) will be used to identify peak migration times and identify possible correlations with fatalities.
- Subject to the mitigation cost cap (discussed further below), at the direction of DGIF operational adjustments and deterrent technology may be tested and experimentally implemented to study their effectiveness at reducing wildlife mortality.

Monitoring and Mitigatory Conditions:

- Based on mortality data (adjusted for searcher efficiency and scavenging rates) gathered during the first year of operations, the operator and DGIF cooperatively will design and experimentally implement, if necessary, operational procedures during peak migration periods to reduce bat fatalities to: (i) 3 migratory tree bats (red, hoary, and silver-haired)/turbine/year; (ii) 1 eastern pinistrelle/turbine/year; (iii) 0.1 eastern small-footed myotis/turbine/year; and (iv) 5 other bats (little brown, big brown, northern long-eared, etc.)/turbine/year. The long-term objective of testing and implementing operational adjustments is to achieve a fatality rate of no more than 2.1 bats/turbine/year, or a figure otherwise considered acceptable to DGIF after analysis of project-specific, regional, and national mortality data.
- Regarding birds, the focus is on raptors and on other species in decline and/or otherwise exhibiting imperilment in Virginia. Therefore, the mortality rate "target" only shall apply to Species of Greatest Conservation Need (SGCN: Tiers I – IV) as documented in the Virginia Wildlife Action Plan (see <http://bewildvirginia.org/species/birds.pdf> for more information). Based on mortality data gathered during the first year of operations, the operator and DGIF cooperatively will design and experimentally implement, if necessary, operational procedures during peak migration periods to reduce bird fatalities to 6.9 SGCN birds/turbine/year or less, beginning with the second year of project operations. The long-term objective of testing and implementing operational adjustments is to achieve a fatality rate of no more than 2.3 SGCN birds/turbine/year, or a figure otherwise considered acceptable to DGIF after analysis of project-specific, regional, and national mortality data.
- If a dead or injured Endangered or Threatened species is encountered on the project site, U.S. Fish and Wildlife and DGIF will be notified as soon as possible, and within 24 hours.
- The facility will be open to DGIF or its designees to conduct research on wildlife passage rates, site utilization, and management of wind energy production impacts on wildlife for the life of the project.
- All monitoring and mitigation conditions are transferable with the operating license.

Funding of Research and Monitoring and Mitigation for Bats and Birds:

- The operator agrees to fund such research and monitoring through DGIF at the annual rate of \$150,000 per year for the first three years of project operation.
- After the first three years, the operator agrees to fund continued research and monitoring during the life of the project at an annual rate that does not exceed the higher of (1) \$100,000, or (2) 1.75% of the prior year's total revenues.
- After year three the annual rate of funding for research and monitoring will be determined by DGIF by the most-recently documented mortality level, with annual funding not to exceed the fund rates established above. For example, in determining the annual funding rate, the following parameters are relevant (but not exclusive):
 - (i) whether mortality levels of 2.1 bats and 2.3 SGCN birds or fewer are achieved during the prior three years of operation; (ii) whether mortality levels between 2.1 and 9.1 bats/turbine/year (and not in excess of the specific take levels for bat species groups

listed above) and/or 2.3 and 6.9 SGCN birds/turbine/year are documented; and
 (iii) whether mortality levels exceed 9.1 bats/turbine/year (or exceed the specific take levels for bat species groups listed above) and/or 6.9 SGCN birds/turbine/year during the prior three years of operation.

- The operator agrees to fund mitigation through annual curtailment plans provided by DGIF at an annual rate that does not exceed the higher of (1) \$50,000, or (2) 0.85% of the prior year's total revenues.
- DGIF will structure an annual curtailment plan to be implemented by the operator and will provide the operator, on an annual basis, parameters for curtailment that will be required for the next plan year.
- At any time after year three, DGIF and/or the Applicant may petition this Commission for modifications to the mitigation cost caps, which could include raising, lowering, or reallocating funds among mitigation and monitoring.
- In addition, for each raptor killed at the facility, the operator will provide funds to DGIF for continued raptor research and management in accordance with the Commonwealth's established raptor replacement values as follows:

<u>Species</u>	<u>Replacement Cost</u>
Northern Harrier	\$1,000.00
Mississippi Kite	750.00
Swallow-Tailed Kite	750.00
Sharp-Shinned Hawk	500.00
Copper's Hawk	500.00
Northern Goshawk	750.00
Red-Shouldered Hawk	500.00
Broad-Winged Hawk	500.00
Red-Tailed Hawk	500.00
Rough-Legged Hawk	750.00
Bald Eagle	1,500.00
Golden Eagle	750.00
Osprey	500.00
Merlin	750.00
American Kestrel	500.00
Gyr Falcon	750.00
Peregrine Falcon	1,500.00
Barn Owl	1,000.00
Long-Eared Owl	750.00
Short-Eared Owl	750.00
Great Horned Owl	500.00
Snowy Owl	750.00
Barred Owl	500.00
Northern Saw-Whet Owl	1,000.00
Eastern Screech-Owl	500.00
Unidentified/Unspecified Raptor	500.00